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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 976

JOHN A. SEALY, JR., et al.,

Petitioner,

v.

DEPARTMENT OF PUBLIC INSTRUCTION OF PENNSYLVANIA, et al.,

Respondents

BRIEF

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, BY RESPONDENTS, THE SCHOOL DISTRICT OF THE TOWNSHIP OF DARBY; ITS BOARD OF SCHOOL DIRECTORS, JAMES E. STEPHENS, et al., AND DONALD L. SNIVELY, SUPERINTENDENT OF SCHOOLS.

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OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 159 F. Supp. 561 (1957). The opinion of the United States Court of Appeals for the Third Circuit is reported in 252 F 2nd 898 (1958).

JURISDICTION.

Petitioner invokes the jurisdiction of this Honorable Court under § 1254 of the Judicial Code, 62 Stat. 928 (1948) 28 U. S. C. § 1254 (1952). The decision of the Court of Appeals was entered on February 5, 1958. The petition was docketed May 5, 1958, the time for filing of which expired May 6, 1958.

STATEMENT OF THE CASE.

Petitioners' Statement of the Case is accepted except with respect to the following:

(Petition Page 6 Paragraph 2) Darby Township, in Delaware County, Pennsylvania, was incorporated in 1683 by William Penn's government. Other municipal entities were incorporated out of Darby Township as population increased and necessity arose for more immediate local government. Beginning with the incorporation of the Borough of Darby in 1853, the "carving" took place over a period of years ending with the Borough of Folcroft in 1922.

(Petition Page 7 first full Paragraph) Darby Township School District, a separate municipal entity whose boundaries are coterminous with those of Darby Township, was authorized to establish its own junior high school

in 1926, and erected and has operated and maintained such school since that date on an entirely integrated basis. Attendance of pupils, negro and white, at the location of the proposed junior high school would not necessitate the passing of predominantly white schools within the geographical limits of School District of Darby Township. Passing of predominantly white schools would, if any, be those schools which have been operated for many years by school districts other than School District of Darby Township.

ARGUMENT.

I.

We are concerned in the instant case with the selection of the site for a proposed new junior high school for the School District of the Township of Darby and the construction of a building thereon. The site was chosen at a meeting of the local school board when all members present were members of the negro race. Action taken by the Respondents in the various steps required by law in perfecting the building project and obtaining the necessary administrative approvals, fill over 1100 pages of a record where the "Court granted plaintiffs a wide latitude in view of the current constitutional controversies concerning segregation and discrimination" (Petitioners' Appendix "A", page 24), and where, as admitted by the Petitioners, "all of the evidence was before the Court on all issues" (Petitioners' Questions Presented IV, Page 5 of Petition), yet both the District Court and the Circuit Court Below found the record barren of any showing of discrimination or segregation.

The factual situation here involved,—where all students, both negro and white, are now attending the present junior high school, and will have an opportunity to attend the proposed new junior high school,—is not similar to the case of *Brown* v. *Board of Education of Topeka*, 349

U. S. 294, where segregation of whites and negroes was definitely established and conceded as such. There is no segregation in the School District of Darby Township, nor is there any allegation that there is or ever has been segregation. The Court Below did not decide a question on racial discrimination in a way in conflict with any decision of this Court requiring eliminaton of racial discrimination in the public schools with all deliberate speed. The District Court Below found as a fact that there was not a single iota of testimony that the actions of any Respondent were motivated by any racial discrimination whatsoever. (Finding of Fact No. 10, Petitioners' Appendix "A", page 20.) And in fact, the District Court Below definitely stated that the recent cases under the Equal Protection clause of the Fourteenth Amendment continually adverted to throughout the trial and during argument had no applicability to the factual situation here involved. (Petitioners' Appendix "A", page 24.) The decision of the Court Below was in no way in conflict with the decisions of the Supreme Court of the United States. No court has ever decided that discrimination arises merely because a school building is placed in one part of a school district and not in another part of the same school district, where there is no allegation whatsoever of segregation.

II. III.

On September 11, 1952, the Respondent School District of the Township of Darby determined upon a plot of land for a site for its possible future junior high school. After all the preliminaries of approvals, building plans and financing had been perfected and made ready to advertise for construction bids (Findings of Fact No. 8 Petitioners' Appendix "A", page 19; and Finding of Fact No. 16, Petitioners' Appendix "A", page 21), this suit was instituted in April 1957.

The Bill of Complaint seeks first,—to restrain the location and construction of the new junior high school, and second,—to set aside the so-called Delaware County Plan for reorganization of administrative units; both on the ground of racial discrimination. Trial was held before the District Court Below in June, 1957. That Court's Order was entered on September 7, 1957, determining that the relief in the first instance was unrelated to the other relief. This was substantiated in open court on December 11, 1957, when evidence was produced of a formal resolution adopted by the Pennsylvania State Council of Education withdrawing its former approval of the Delaware County Plan and inviting a survey to be undertaken and completed not later than February 1, 1958 for an alternate Plan for further consideration. (Notes of Testimony p. 1122).

The District Court Below recognized that on the one hand there was a pressing need for the new building and possible irreparable damage by reason of further delay in its construction, and that on the other hand the Delaware County Plan was indefinite and unconcluded, as the Court found:

> "15. The Plan itself is not self-executing, but provides for its implementations, that is, for the realization of the administrative units set forth in it by three methods, to wit, joinder, union or merger, the former being accomplished by the vote of the school districts concerned and the latter two by submitting the proposals in the Plan to the electorate for their approval." (Finding of Fact No. 15 Petitioners' Appendix "A", page 25.)

In its Opinion the District Court Below states "The Delaware County Plan is a proposed grouping of school districts, and is at best only a hope, because the implementation of the Plan must be done either by a vote of the electorate or by resolution of the various boards con-

templated within the group." (Petitioners' Appendix "A", page 25.)

The District Court Below considered the two claims multiple claims for relief, the one definite, positive and urgent, the other indefinite and uncertain.

The determination of judgment upon one or more but less than all of the claims, where multiple relief is sought, is one for the court under Rule 54 (b) F. R. C. P., upon its express determination that there is no just reason for delay. The District Court Below found that there is a pressing necessity for a new junior high school since the present junior high school is inadequate and in a rather bad state of deterioration; and further that if the injunctive process prevents the completion of the proposed junior high school and a new application is made to the Commonwealth of Pennsylvania for the right of reimbursement for a different project, it will have to take its place behind some five hundred and eighteen pending applications and no state reimbursement for new projects would be available until 1962; that the present financing arrangements called for a three per cent interest rate with a total cost to School District of Darby Township of $1,887,424.00 and if the district cannot participate in the state reimbursement presently allocated to it and would proceed in the open market, it might have to pay an interest rate of as much as 4½%, which would be an increased cost to the taxpayers of more than $880,000.00. (Finding of Fact No. 17, Petitioners' Appendix "A", pp. 21 and 22). The District Court Below was indeed cognizant of the possible delay, with no just reason for it then, as now. Then, on August 27, 1957, the date of the Findings, and on September 7, 1957, in its Order and Judgment the District Court Below found " pursuant to the provisions of F. R. C. P. 54 (b) * * * there is no just reason to delay, and, to avoid irreparable damage, justice requires the entry of a final judgment with respect thereto" (Petitioners' Appendix "A", page 27). We submit there was no abuse of discretion.

Moreover the subsequent actions taken by the proper authorities as related in footnote 1 on page 40 of Judge Biggs' Opinion in the Circuit Court (Petitioners' Appendix "B", page 40), show that Petitioners' rights relative to the Delaware County Plan have not been foreclosed.

Official Opinion No. 19 of the Attorney General of Pennsylvania dated September 20, 1957, is foot noted into Petitioners' argument and urged as a basis for the relationship of the construction of the new junior high school to the status of the Delaware County Plan. This opinion of the Attorney General obviously does not support Petitioners' argument. Its language must be confined to the matter being determined by the Opinion, namely the right of the State Council of Education to withdraw approval of a County Plan, not as to any interpretation of the State Public School Building Authority Act, of July 5, 1947, P. L. 1217, as amended (24 Purdons Statutes § 791.1, *et seq*). The District Court Below held that the matters were not related, and the Circuit Court affirmed its judgment.

The facts in this case are not at all like those in the case of *Clemons* v. *Board of Education of Hillsboro*, 228 F. 2nd 853, decided by United States Court of Appeals for the Sixth Circuit which involved arbitrary zoning for segregation purposes. There is no "zoning system" in the School District of Darby Township. There is no segregation whatsoever in the School District of Darby Township. The two parts of the School District have been separated for over 40 years, and the separation is geographical not racial. The placing of the junior high school in either part will work inconvenience to the other. Inconvenience is not discrimination. The students in one part of the school district have no fundamental rights to have a school building placed in that part, no matter what their color may be. Nor does a change in popula-

tion of one color in one part create discrimination, where there is no restriction whatsoever as to the students who attend the schools in the district.

IV.

The Petitioners sought relief on all claims based on the issue of racial discrimination. Petitioner in this Questions Presented IV of his Petition, admits that "all the evidence was before the Court on all issues" (Petition, page 5). Respondents have set forth in reply to Questions Presented I, the findings of the District Court particularly Finding of Fact No. 10 (Petitioners' Appendix "A", page 20) that "the record discloses in no instance a single iota of testimony that the consideration of the Darby Township School District Board, in the selection of the site for the proposed new junior high school and its construction thereon, was motivated by any racial discrimination whatsoever, and the record is equally clear concerning the Department of Public Instruction, State Council of Education, and the State Public Building Authority, as well as every other defendant of record." This finding is indeed all inclusive and sweeping and includes not only those respondents having to do with the selection of the site and the construction of the building, but also "every other defendant of record", not all of whom were concerned in the building program. As Chief Judge Biggs stated—"This is indeed a strong statement for a court to make but it is probably not too strong" (Petitioners' Appendix "B", pages 40-41), and further "On this record we, like the Court below, can perceive no intent to discriminate or to segregate" (Petitioners' Appendix "B", page 42). No segregation having been alleged and no discrimination having been found, there was no violation of the Petitioners' rights under the Fourteenth Amendment to the Constitution of the United States.

Certainly with the positive statement in the finding of the District Court Below affirmed by the Circuit Court,

even if restricted to the claim respecting the building of the junior high school—no basis exists for the retention of jurisdiction over that claim until the claim concerning the County Plan, which is indefinite, "at best only a hope", is determined. Law, order and justice, should bar further delays to this pressing necessity for a new junior high school in the School District of Darby Township with the irreparable damage to the youth, negro and white, of this district.

CONCLUSION.

Petitioners have failed to show any violation of rights conferred upon them by the Constitution and laws of the United States and are consequently without standing in the Federal Courts. It is, therefore, urged that the petition for the writ of *certiorari* be denied.

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Respondents.